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ACT OF STATE

ACT OF STATE—A BRIBERY EXCEPTION TO THE ACT OF STATE DOCTRINE? ACT OF STATE DOCTRINE BARS JUDICIAL INQUIRY INTO THE VALIDITY OF A FOREIGN SOVEREIGN'S ACTS, BUT NOT INTO THE MOTIVATIONS BEHIND THE ACTS: *W.S. Kirkpatrick, Inc. v. Environmental Tectonics* 1231

ADMINISTRATIVE LAW

Aliens' Right to Seek Asylum: The Attorney General's Power to Exclude "Security Threats" and the Role of the Courts ... 187

ABSTRACT

This Note addresses the tension between an alien's right to asylum and the United States right to exclude aliens from admittance to the United States. Section 235(c) of the Immigration and Naturalization Act gives the Attorney General the power to exclude aliens whom the Attorney General deems to pose a threat to national security. Section 243(h) of the Refugee Act requires the Attorney General to establish asylum application procedures irrespective of an alien's status. This Note examines the interrelationship between these sections through an in-depth analysis of the legislative, judicial, and administrative interpretations of the two provisions. The Note attempts to reconcile the two provisions through a reading of the provisions and an examination of the relevant case law.

The Note places particular emphasis on the holding in Azzouka v. Sava *in which the United States Court of Appeals for the Second Circuit resolved the apparent conflict between the two acts. The* Azzouka *court held that if the Attorney General determines an alien to be a security threat, that alien may be excluded without a hearing before an immigration judge despite the fact that the alien has requested politicial asylum. The Note proposes an alternative balancing of the alien's right to seek asylum and the Attorney General's summary exclusion power which would allow a judicial determination on the merits of the alien's asylum claim, any allegations that the alien is a security threat notwithstanding. The Note concludes that aliens who may face persecution or death if returned to their homelands may be spared the cruel treatment of summary exclusion without a hearing.*

Property Damage Claims Against the Customs Service: Are There Adequate Remedies? 385

ABSTRACT

This Note addresses the availability and adequacy of remedies to owners of property that the United States Customs Service damaged, lost, or destroyed during searches and seizures. The Note argues that because the role of the Customs Service has expanded from merely regulating duties on imports to becoming the principle border control agency, the likelihood of property being damaged during Customs searches and seizures has greatly increased. The Note then examines a claimant's potential remedies for damaged property and demonstrates the inadequacies of these remedies.

First, the Federal Tort Claims Act fails to provide a remedy because, on the basis of sovereign immunity, the United States Supreme Court has precluded recovery for property damage under the Act. Second, actions brought pursuant to the Tucker Act, which permits constitutional and contractual claims against the government, are ineffective. Constitutional claims brought under the "takings" clause of the fifth amendment fail because courts generally deny recovery for takings that occur during the course of governmental regulatory activities, including Customs searches. The contractual claim also fails; courts generally do not recognize an implied-in-fact contract of bailment between the property owner and the Customs Service. Third, the Liability Reform Act, official immunity and proof problems limit the availability of individual actions against Customs offices. Fourth, the availability of legislative relief is limited because of external factors. Finally, the Small Claims Act, which allows compensation up to $1,000 for property damage due to the negligence of government officers acting within the scope of their employment, is inadequate. To recover, a claimant must be ineligible to bring action under the Federal Tort Claims Act and the decision to settle is completely up to the

government, which has no incentive to waive its sovereign immunity. The Note concludes that as the role of the Customs Service expands and the intrusiveness of Customs searches increases, the United States government should address the inadequacy of remedies available to people whose property is damaged during Customs searches.

ADMIRALTY

Dispute Settlement in International Environmental Issues: The Model Provided by the 1982 Convention on the Law of the Sea 1097

ABSTRACT

This Article discusses the merits of the dispute settlement provisions found in the 1982 United Nations Convention on the Law of the Sea, and calls for recognition and utilization of the provisions in all manner of disputes arising within the international legal community. Professor Kindt notes that despite the fact that the Conventions's dispute settlement provisions represent the first time all major interest blocs of states have agreed upon a standard set of provisions for dispute settlement, the provisions have not received the attention they deserve. After analyzing the reasons for this lack of consideration, he urges that the dispute settlement provisions serve as quasi-boilerplate language in multilateral treaties, especially in the area of environmental law. In part II of this Article, Professor Kindt examines the application of these provisions in relation to particular law of the sea issues and argues that more extensive use of the dispute settlement provisions would better serve the goal of maintaining a favorable legal order. He cites specific recent examples in which the application of these provisions would have fostered the resolution of disputes. In part III, Professor Kindt analyzes the three major divisions of the dispute settlement provisions: 1) the general provisions; 2) the compulsory procedures leading to binding decisions; and 3) the limitations and exceptions to compulsory procedures. He then explains their application in a variety of situations and concludes that the provisions offer a stable and efficient means of handling international disputes, expecially with regard to environmental issues. Since a large number of countries representing a wide array of political, economic, and ideological views agreed to the substance of the dispute settlement provisions, Professor Kindt argues that the provisions may well represent customary international law and should be utilized to the fullest extent possible.

Japan's East China Sea Ocean Boundaries: What Solutions can a Confused Legal Environment Provide in a Complex Boundary Dispute? 581

ABSTRACT

This Note addresses the ocean boundary delimitation conflict between Japan, China, Taiwan, and South Korea in the East China Sea. The author considers international law on boundary delimitation and concludes that the law is unclear on delimitations between states within four hundred nautical miles of one another. The International Court of Justice has held that equity is the norm to be applied to boundary delimitation disputes but it has not resolved the competition between the natural prolongation theory of delimitation and a theory based upon the Exclusive Economic Zone. The geology of the East China Sea brings this issue to the fore. The author concludes that regardless of how this conflict is resolved, equidistance, proportionality, and other equitable concerns will apply to any boundary delimitation. The Note accounts for the political situation in the East China Sea area and concludes that the possibility of reaching a solution is greater than it has been in the past. The author nevertheless argues that it will be necessary to look to alternatives to existing legal precedents to develop a solution to the dispute in the East China Sea. These alternatives include the creation of joint development zones, a compromise of the best legal position advanced by each side and an approach based on strict proportionality.

The Marine Mammal Protection Act and International Protection of Cetaceans: A Unilateral Attempt to Effectuate Transnational Conservation 997

ABSTRACT

This Note examines how the United States has used the Marine Mammal Protection Act to further international protection of cetaceans—dolphins, porpoises and whales. The author first reviews the manifold reasons for protecting cetaceans. The author describes the international operation of the Act as amended in 1984 by surveying those sections that have an impact on United States relations with other states and the regulations and cases that implement those sections. The author concludes that these restrictions have produced a decline in porpoise mortality, although more can be done. The author next describes the successes of the Act's treaty program. Several cetacean species are listed in a protective treaty as endangered, resulting in a prohibition on international trade in those species and their products. United States efforts have produced an international moratorium on whaling. The author continues by examining the 1988 Amendments to the Act. Under the amendments, many restrictions on commercial fishers have been lifted on an interim basis to give the United States Secretary of Commerce enhanced flexibility in dealing with both domestic and foreign fishing fleets. Tuna fishers, however, who pose a danger to porpoises, face even more stringent restrictions than previously, thus holding the Act true to its

primary purpose. Finally, the author concludes that, although the Act has had some success, Congress has often been unwilling to impose economic burdens on fishers, and even in many instances when Congress has acted strongly, the executive has been lax in enforcement.

Europe 1992 and the Rise of the Pacific Rim: Do Changing World Trading Patterns Require a Change in United States Shipping Laws? 1035

ABSTRACT

This Article analyzes the significant issues facing the Presidential Advisory Commission on Ocean Conferences in Ocean Shipping, which will assess the success of the Shipping Act of 1984 and will report to Congress on the need for changes in the 1984 Act and in United States regulatory policy regarding international ocean common carriers. Mr. Danas recommends that the Commission carefully examine the antitrust-exempt conferences, which international ocean carriers have been organizing for over one hundred years for the purpose of self-regulation and rationalization. Mr. Danas suggests that the review of the continued existence of the liner conference system requires a recognition that the ocean transportation industry is changing into an international intermodal transportation industry that handles shipments in one continuous movement from origin to destination. The author emphasizes that the development of a post-1992 European Common Market and the adoption of Pacific Rim distribution techniques will further the trend towards integrated transportation companies and the use of full service logistics in international shipping. He suggests that the development of the international intermodal transporation company and the needs of shippers dealing with such companies must figure prominently in the Advisory Commission's treatment of those issues that Congress has required it to address—tariff filing, antitrust immunity for ports, independent action on service contracts, and the existence of the conference system. Mr. Danas suggests a framework whereby the Commission may successfully integrate these issues into the task presently committed to it by Congress.

AFRICA

Conscientious Objection in South Africa: Governmental Paranoia and the Law of Conscription 127

ABSTRACT

In this Article, Ms. Berat links South African conscription legislation and the amount of pressure under which the apartheid regime perceives itself to be. Ms. Berat analyzes the defense legislation of the ruling Na-

tional Party in dealing with perceived threats, and concludes that an ever-lengthening period of mandatory conscription and severe penalties for conscientious objectors whose existence the regime perceives as a threat to the apartheid system are integral to the government's massive militarization scheme to defend against both internal and external challenges. Ms. Berat analyzes the structure of the South African Defence Force, the period of conscription, and the recognition of conscientious objectors from universally pacifist religious groups, from 1957, when the Defence Act was originally promulgated, through the 1987 White Paper that attacked both conscientious objectors and any call for a reduction in conscription. The Defense Act excused legitimate religious objectors from participating in combat assignments but they could be forced to serve in a noncombat capacity. All other objectors were, and still are, criminals, subject to lengthy detention. Ms. Berat maintains that to maintain a large military to enforce apartheid the South African Government disallows conscientious objectors. To reach this conclusion, Ms. Berat analyzes the turning point that led to increased conscription and shows that the government has two basic reasons not to allow secular objectors to receive non-combat positions: (1) granting noncombatant status to non-religious objectors would grant white South Africans the opportunity to object to service in the South African Defence Forces; and (2) the South African Government feared an increase in the number of applications for noncombatant objector status. South Africa sought to quash objection by refusing to tolerate any conscientious objection that interfered with the efficient operation of its militaristic policies. Ms. Berat compares the South African regime to both democratic and totalitarian states to show that alternatives exist through which South Africa can condone the peace promoting activities of conscientious objectors and thus prevent liberal males from going into exile as the only alternative to joining the military. Ms. Berate concludes, however, that the apartheid regime has dug itself in and will not tolerate secular conscientious objectors for fear of the destruction of the apartheid government.

ALIENS

Aliens' Rights to Seek Asylum: The Attorney General's Power to Exclude "Security Threats" and the Role of the Courts 187

For Abstract, see **ADMINISTRATIVE LAW**

ANTARCTICA

Death of a Treaty: The Decline and Fall of the Antarctic Minerals Convention 631

ABSTRACT

On June 2, 1988, in Wellington, New Zealand, thirty-three states

signed the Convention on the Regulation of Antarctic Mineral Resources. This agreement, the product of six years of negotiation, fills a significant gap in the Antarctic Treaty System: it provides rules governing the prospecting, exploration, and development of minerals in Antarctica. Recently, however, two Antarctic Treaty Consultative Parties—France and Australia—have refused to ratify the Minerals Convention, instead advocating a permanent ban on mineral activities in Antarctica. Their opposition thwarts plans for the ratification of the Minerals Convention. This Note provides an overview of the present Antarctic Treaty System, sets forth the provisions of the Minerals Convention in detail, and discusses the Convention's strengths and weaknesses. Finally, this Note outlines the events that led to the collapse of the Convention.

ASIA

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AUSTRALIA

From Red Lion Square to Skokie to the Fatal Shore: Racial Defamation and Freedom of Speech 431

ABSTRACT

This Article addresses, against the backdrop of possible legislative reforms in Australia, the tension between the desire to eliminate racial defamation and the need to protect freedom of speech. In an historical overview, Professor Partlett notes an increasing sensitivity to racial issues in Australia in the face of an assumed but nebulously stated value of free speech. Professor Partlett analyzes theoretical and legal approaches to free speech from Commonwealth and United States perspectives, and analysis of recent legal and social developments in civil rights in the United States makes this article relevant for both Commonwealth and United States reformers in this area of the law. He concludes that the interest served by free speech is the individual's interest of autonomy. Thus, the aim to promote individual autonomy, accompanied by a presumption favoring free speech and a healthy suspicion of government, legitimates cautious governmental regulation of speech. Government action in this area is best expressed through government's role as a speaker on moral matters and through the institutional competence of the courts. Professor Partlett then analyzes the recommendations of the Australian Human Rights Commission to amend Australia's 1975 Racial Discrimination Act and finds that its attempts to outlaw racial defamation and

incitement to racial hatred neglect the value of free speech. Professor Partlett proposes two alternatives for achieving a more comfortable balance—alternatives through which government may symbolically condemn incidents of racial defamation yet give sufficient ambit to the exercise of free speech.

COMMERCE

The Death of Ideology in Soviet Foreign Investment Policy: A Clinical Examination of the Soviet Joint Venture Law of 1987 1

ABSTRACT

In this article, Professor Osawke addresses the Soviet Joint Venture Law of 1987, an important instrument of perestroika. *The fate of any international joint venture in the Soviet Union is directly tied to* perestroika*'s success or failure. Of the three component parts of* perestoika—glastnost *(openness),* demokratizatsiia *(democratization), and* uskorenie *(acceleration of economic growth)*—uskorenie *is the least likely to succeed. Unless the Communist Party lossens its grip on the economy, makes the ruble a convertible currency, and the Soviet union abandons the state monopoly of foreign trade and the current pricing and central planning systems, the Soviet Union will never reach the goals of* uskorenie.

Professor Oskawe reminds the reader that the Joint Venture Law is only the tip of an iceberg composed of the entirety of Soviet law. For a Western commercial concern to enter and operate safely in the Soviet economy, that business must be familiar with the whole of Soviet civil and commercial law, not just the Joint Venture Law. Professor Oskawe concludes that President Gorbachev's efforts to rejuvenate the Soviet economy are more property termed peredyshka *(an interlude) than* perestroika *(a restructuring). Because investments are safe and profits large, Western entrepreneurs should, however, enter into a Soviet joint venture now rather than await the final verdict on* perestroika.

Having reached this conclusion, Professor Osawke identifies the inherent hazards of joint ventures in the Soviet Union, and compares them favorably to the risks of entering a joint venture in the seven other socialist states that have adopted joint venture laws since World War II. The Soviet Union has gone to great lengths to protect Western technology, to free joint ventures from state central planning in many areas of their operation, and to provide legal stability.,

Professor Osawke next outlines and analyzes the technical rules and general framework of the Joint Venture Law using seven thematic headings: (1) formulation; (2) dispute settlement; (3) management structure; (4) taxation and insurance; (5) bookkeeping and auditing procedures; (6) recruitment and employee rights; and (7) dissolution. As comprehensive as the Joint Venture Law was intended to be, its first two years produced

disharmony. In response, amendments were promulgated in December 1988. These amendments reflect the Soviet Union's desire to encourage joint ventures and give joint ventures more flexibility in their operation. According to Professor Oskawe, some of the amendments are of questionable constitutionality, however, directly conflicting with prior Soviet law.

Professor Osawke concludes that the Joint Venture Law has failed to live up to its expectations. Still, the Soviets are willing to listen to the West and consider the needed changes. Professor Osakswe himself offers several suggestions for reform, both within and beyond the framework of the Joint Venture Law.

The New Section 301 of the Omnibus Trade and Competitiveness Act of 1988: Trade Wars or Open Markets? 491

ABSTRACT

This Article examines the changes brought about in United States trade policy by the Omnibus Trade and Competitiveness Act of 1988. Mr. Phillips provides a detailed history of the evolution of the Act's three main revisions of section 301: the transfer from the President to the United States Trade Representative (USTR) of the power to identify foreign unfair trade practices and to take action in response; the imposition of mandatory retaliation by the USTR against unfair trade practices unless one of six exceptions applies; and, under the "Super 301" provision, the USTR's obligation to identify unfair trade balances and either to negotiate reductions in or to take mandatory action against such imbalances. Mr. Phillips states that in cases involving minor trade disputes the revisions effected by the Act should depoliticize and bring greater certainty of action to United States responses to unfair trade barriers. Mr. Phillips observes that although the new authority of the USTR may help take non-trade considerations out of some cases, it probably will not affect the highly controversial disputes. While Super 301 contains mandatory retaliation provisions, the President retains power to influence how the USTR implements retaliatory actions. Super 301 could also cause United States to violate trade agreements. Mr. Phillips concludes that the Act can only have a minor effect on the United States trade deficit, the largest part of which results from macroeconomic policies.

Europe 1992 and the Rise of the Pacific Rim: Do Changing World Trading Patterns Require a Change in United States Shipping Laws? 1035

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The Northern Ireland Broadcsting Ban: Some Reflections on Judicial Review 1119

ABSTRACT

This Essay initially examines the British government's ban on its broadcasting networks that restricts coverage of certain Northern Ireland organizations, and concludes by making some reflections on the system of judicial review in the United States. Professors Weaver and Bennett note that a comparable ban in the United States probably would be held unconstitutional. In Great Britain, however, the courts lack a similar power of judicial review, leaving the question of the Ban's legitimacy to the political process. While Great Britain enjoys a relatively free society, the authors conclude that government control over the British media poses troubling problems and suggests that the system of judicial review in the United States cannot be said to be unnecessary.

COMPARATIVE LAW

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CONFLICTS OF LAW

The Public Policy Exception to the Recognition of Foreign State Judgments 969

ABSTRACT

This Note examines the public policy exception to the recognition and enforcement of foreign judgments. The author first examines other grounds that a United States court can use to refuse to recognize a foreign judgment. An analysis of several cases construing the public policy exception follows. The author concludes with a suggested analysis for courts faced with the public policy exception.

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From Red Lion Square to Skokie to the Fatal Shore: Racial Defamation and Freedom of Speech 431

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CORPORATIONS

Book Review: Dellapenna, Suing Foreign Governments and Their Corporations 1029

Tender Offers in the European Community: The Playing Field Shrinks 923

ABSTRACT

This Article discusses the Proposal in the European Community to standardize the tender offer process in the Single European Market of 1992. The Proposal promotes equal treatment of shareholders and contains substantive measures to achieve this goal. Mr. Greenbaum compares the Proposal to its United States counterpart, the 1968 Williams Act, notes the different approach taken by the Williams Act, with its emphasis on disclosure rather than substantive regulation, and examines these different approaches primarily in the context of hostile tender offers. Mr. Greenbaum shows that the Proposal's procedural requirements for the bidder and restrictions on target management defenses leave both with a smaller tender offer playing field within which to maneuver. In addition, Mr. Greenbaum suggests that the Proposal may not be able to provide the type of shareholder protection it envisions unless there is stringent Community control of Member State anti-takeover regulation.

DEVELOPING COUNTRIES

The Economics of Intellectual Property Rights and the GATT: A View From the South 243

ABSTRACT

This Article summarizes, against the backdrop of the Uruguay Round negotiations, the conflicting views of First and Third World countries regarding enhanced intellectual property rights and their relevance for the Uruguay Round negotiations from a Third World perspective. Dr. Primo Braga addresses the economic implications of enhanced intellectual property rights on Third World countries. He analyzes the arguments for and against intellectual property protection in less developed countries (LDCs), and offers a mathematical formulation of the net welfare impact of intellectual property reform. Dr. Primo Braga then discusses the signficaint philosophical differences between First and Third World countries, including the tendency of Third World countries to assign a higher weight to "social" interests than do First World countries. Dr. Primo Braga notes that enhanced intellectual property rights protection will have a varied impact on Third World economies. The uncertainty as to the effect of enhanced intellectual property protection on the economies of LDCs, when coupled with the legal, political and philosophical differences among First and Third World countries suggests that radical changes in the intellectual property area will not lead the way in the Uruguay Round negotiations. Finally, Dr. Primo Braga warns that unilateral actions designed to force LDCs to reform their intellectual property system may backfire and frustrate further refo-

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ABSTRACT

In this Article, Mr. Gadbaw analyzes the interaction between trade and intellectual property policies by examining developments in United States law, the General Agreement on Tariffs and Trade (GATT), and the World Intellectual Property Organization (WIPO). Mr. Gadbaw notes that the integration of intellectual property and international trade policy in the United States has led to a policy consensus around the dual principles that there should be certain minimum standards of intellectual property protection and that trade with foreign states should be conditioned on adherence to these standards. This integration came only recently, at the impetus of United States businesses concerned about developments in foreign states leading to the deterioration of protection of intellectual property rights. Congress responded to these private sector concerns with the Trade Act of 1984, which requires the United States President to take into account the protection a foreign state affords intellectual property rights in determining that state's trade status, and the Semiconductor Chip Protection Act of 1984. Mr. Gadbaw argues, however, that these statutory efforts will be impeded by the GATT, which contains only limited reference to intellectual property rights. United States trade retaliation against foreign states failing to protect intellectual property rights will thus probably not be considered justifiable under the

GATT framework. Mr. Gadbaw argues that the United States must take an aggressive stance at the upcoming WIPO conference on semiconductor designs to make clear to the world that there has been a fundamental change in United States policy toward intellectual property rights. Mr. Gadbaw believes that the United States must push for a treaty that is not so general that it allows states to erode it and that includes adequate provisions for enforcement and dispute settlement. Mr. Gadbaw concludes that any "divorce" of intellectual property and international trade will skew the focus of United States strategy, hindering the achievement of United States objectives in the increasingly critical area of intellectual property.

Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection 747

ABSTRACT

Professor Reichman uncovers a paradox at the heart of the debate about bringing international intellectual property relations within a GATT Code of Conduct. On the one hand, the industrialized countries that subscribe to a free-market principles at home want to impose a highly regulated market for intellectual goods on the rest of the world, one in which authors and inventors may "reap where they have sown." On the other hand, the developing countries that restrict free competition at home envision a totally unregulated world market for intellectual goods, one in which "competition is the lifeblood of commerce." To unravel this paradox, he identifies a set of postulates for negotiators on both sides. Included in this list is the lack of an international norm against misappropriation; a long-term need to assimilate intangible alien property to the international law of state responsibility; the duty to respect sovereign rights of both rich and poor states to control their own economic destinies; and the emergence of preferential treatment for developing countries as a principle of international economic law.

Armed with these postulates, Professor Reichman derives a set of analytical propositions to guide a TRIPs negotiation conducted in the spirit of cooperation and good faith. A crucial move in this analysis is to distinguish between defensive proposals to institute transnational legal barriers to imports of nonqualifying intellectual goods and offensive proposals to establish universal standards of protection that could limit the development strategies even of states that do not export intellectual goods to major markets. As regards proposals for a defensive alliance bolstered by common border control measures and by the dispute settlement machinery of the GATT, Professor Reichman offers a new interpretation of Article XX(d) that minimizes conflict with the basic GATT disciplines. However, Contracting Parties that participate in a defensive alliance must strictly respect their obligations to provide national treatment under the Paris, Berne, and Geneva (U.C.C.) Conventions, and they may

find the transaction costs of implementing the scheme too high in the end.

As regards offensive proposals that pit universal standards of protection against national development strategies, Professor Reichman finds that basic GATT rules cannot be overcome unless preferential measures favoring the developing counties are combined with trade concessions offsetting the costs of economic dislocation. Given such an approach, Professor Reichman suggests that Contracting Parties that already adhere to intellectual property conventions can be persuaded to provide adequate, not maximum, levels of protection for the traditional subject matters of those Conventions and they should renounce systematic misappropriation of applied scientific know-how. Contracting Parties that do not adhere to one or more intellectual property conventions pose a harder case, but Professor Reichemn argues that these states cannot expect indefinitely to exploit the most valuable alien property of all without paying compensation in one form or another.

Professor Reichman fears, however, that maximalist illusions will cause the Uruguay Round to produce fewer positive results than could have been attained in a spirit of moderation and compromise. He warns that continued insistence on universalist theses unacceptable to the developing countries risks provoking these countries to form a "Union" of their own in order to curtail rights that the industrialized countries currently enjoy under existing intellectual property conventions. He points out that the real losers in such a confrontation would be those authors, inventors and trademark proprietors whose livelihood depends on the day-to-day operations of the international system that the Paris and Berne Conventions set in place over a century ago.

Intellectual Property Rights: The Issues in GATT 893

ABSTRACT

This Article examines the need for a multilateral framework to address the trade-related aspects of intellectual property rights (TRIPs). The authors trace the growing importance of TRIPs from its emergence at the Tokyo Round in 1978 to its present state as a major focus of multilateral negotiations at the Uruguay Round. A detailed discussion of existing GATT provisions and their relevance to intellectual property rights follows. The authors then describe the four major substantive issues related to TRIPs that are before the Negotiating Group: substantive standards of intellectual property protection; procedures for the enforcement of intellectual property protection; dispute settlement procedures; and the relationship between the GATT and other international organizations in the negotiations and in any eventual agreement that may be reached at the Uruguay Round.

International Trade and Intellectual Property: Promise, Risks and Reality 285

Abstract

This article addresses the possibility that the GATT will someday govern intellectual property. The United States (supported by the private sectors of Europe and Japan) has taken initiatives to bring intellectual property under the GATT; largely as a result of these efforts intellectual property negotiations were included as a part of the Ministerial Declaration on the Uruguay Round of GATT talks. The authors stress the growing importance of intellectual property to the developed world in general and to the United States in particular—over 25 percent of United States exports include products with a high intellectual property component. The authors describe the problem of pirarcy of intellectual property and the vast economic losses caused by piracy each year. Piracy involves benefitting from intellectual property while avoiding the research and development costs. These losses have focused international attention on the relationship of intellectual property and international trade. The authors suggest that while the United States has used the "threat/negotiation process" to attempt to obtain greater protection for intellectual property under the laws of other states, this can be a problem because it may lead to unilateral retaliation against the United States. The authors also note that for a variety of reasons, some states are not as susceptible to the "threat/negotiation process" as others.

The authors suggest that the use of the GATT would be a superior approach, but the United States must undertake such approach cautiously. The developed countries have not yet agreed on standards of protection or an enforcement mechanism. The developing countries have shown little enthusiasm for the prospect to bringing intellectual property under the protection of the GATT. Creating standards for intellectual property, the authors suggest, will be the most challenging and the most important area of the negotiations. The developing countries do not favor increased intellectual property protection. They caution, however, that if these intellectual property negotiations fail, the vitality of multilateral organizations like the GATT could be seriously impaired.

According to the authors, the United States proposals include the adoption of the Berne Convention as the copyright norm with additional protection for computer software and databases. The United States also seeks the patenting of virtually all subject matter including pharmaceutical products; the adoption of trademark protection; the adoption of trade secret protection; and the adoption of the forthcoming WIPO treaty on semiconductor chips as the minimum standard for protection of mask works. The United States also advocates an agreement on the minimum enforcement of intellectual property laws within states.

The authors state that the United States seeks to use binding dispute resolutions under the GATT to protect intellectual property rights. The authors point out that one danger of the use of binding dispute resolution under the GATT is that it might have the effect of forcing changes in

United States domestic law. The authors suggest that Congress and the executive branch should use care and foresight so that the public interest of the United States is not adversely affected. The authors urge the application of the traditional "public interest" test that Congress always applies to new legislation changing intellectual property laws in the United States. The authors suggest that areas in domestic United States law that might be challenged under the GATT if it is applied to intellectual property include: design law, protection for famous trademarks, protection for appellations of geographic origin and the elimination of authority to patent sexually reproduced plants.

The authors address the likelihood that even if the developing countries continue to object to bringing intellectual property under the GATT, the developed countries may set out their own standards of protection. The authors also suggest that the developed countries' private sector could use investment as a tool for shaping change in the laws and policies of states that will not agree to standards set by the developed world. The article concludes with a recommendation that the United States continue to pursue greater intellectual property protection cautiously.

Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework. 689

ABSTRACT

This Article addresses industralized countries' growing concerns over technology transfer and their efforts to obtain protection of intellectual property rights under the General Agreement on Tariffs and Trade (GATT). Mr. Abbott analyzes the intellectual property problem in the context of the GATT framework and the weakness of current intellectual property protection. Developing countries do not accept the United States contention either that intellectual property is covered implicitly by the GATT or that the current lack of protection reflects a fundamental flaw in the General Agreement. Mr. Abbott focuses on this disagreement in laying out the framework for possible solutions, which include: 1) a separate GATT agreement or code; 2); a framework agreement by consensus decision; and 3) a formal amendment to the General Agreement. Mr. Abbott concludes that an amendment enacted through the GATT's Article XXX(1) procedure, which would be effective upon two-thirds acceptance by the Contracting Parties on the Parties that accept it, would achieve the most realistic near-term solution to the intellectual property problem. Mr. Abbott also focuses on the issue of GATT reciprocity, considering whether the industrialized countries will be under a duty to compensate the developing countries in the event that an agreement on intellectual property is reached. Mr. Abbott concludes that the General Agreement should be analogized to a frustrated long-term commercial agreement, and suggests a compromise on the issue of compensation

The United States Proposal for a GATT Agreement on Intellectual Property and the Paris Convention for the Protection of Industrial Property 265

ABSTRACT

In this article, Dr. Kunz-Hallstein addresses concerns over recent United States proposals to include intellectual property matters in the upcoming Uruguay Round of the General Agreement on Tariffs and Trades (GATT). The proposals stem from the United States perception of the Paris Convention as a system no longer responsive to modern intellectual property problems because of its lack of sufficient enforcement provisions and inadequate dispute settlement procedures.

Dr. Kunz-Hallstein first discusses the competence of the Paris Convention to deal with modern intellectual property problems. He finds the structure created in 1880 to be dynamic in nature, obligating its member states first to seek improvement of the international protection of industrial property within the framework of the Convention.

Dr. Kunz-Hallstein addresses the principle of reciprocity as treated by the Berne, Universal Copyright, and Paris Conventions, and concludes that the Paris Convention does not allow members to demand reciprocity over and above the limits set out in the treaty. Member states consequently are not bound under the Paris Convention to grant national treatment to new objects of industrial property protection. Neither does the principle of national treatment, which, under the Paris Convention, forbids demanding material or concrete reciprocity with respect to the protection of industrial property, bar member states from agreeing in a special arrangement on reciprocity measures.

Dr. Kunz-Hallstein then reviews the general rules and principles of international law with respect to the enforcement of treaty obligations and concludes that the Paris Convention does not lack adequate enforcement procedures. In practice, however, member states have shown a reluctance to use the archaic mechanism of international dispute settlement. United States reformers, he admits, point to the success of the GATT experience in settling trade disputes between states. The author concludes that the principles of the Paris Convention would not exclude the application of a GATT-type procedure for intellectual property rights in a special arrangement.

Although it is legally possible to improve international protection of intellectual property within the framework of GATT, Dr. Kunz-Hallstein concludes that it would not be sound legal policy to circumvent the time-tested system of the Paris Convention. The GATT arrangement would weaken the role of the Paris Union by creating a competing institution. Despite their failures to reform the Paris Convention at the last three sessions, the member states should thus reconsider improvements in intellectual property protection under article 18 of the Paris Convention.

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Interference with Non-National Ships on the High Seas: Peacetime Exception to the Exclusivity Rule of Flag-State Jurisdiction 1161

ABSTRACT

Pursuant to the exclusivity rule of flag-state jurisdiction, a ship on the high seas is subject to the exclusive jurisdiction of the state whose flag she lawfully flies. Conversely, a state may not ordinarily interfere with those ships registered under the laws of another state. International law makes exception to this general rule in certain discrete circumstances. When such an exception exists, a state may lawfully stop, visit, search, and arrest a non-national ship on the high seas—a right normally reserved to the flag-state alone. These exceptions to the exclusivity rule of flag-state jurisdiction form the subject-matter of this Note.

The author begins with a brief history of the origin of the exclusivity rule of flag-state jurisdiction and the development of the rule in international jurisprudence. The Note then provides a discussion of the two modes of interference—the customary right of reconnaissance *and the* droit de visite. *The simple right of* reconnaissance *affords a public ship the right to approach a private vessel on the high seas to inquire her identity. The more elaborate* droit de visite *is composed of two distinct operations: the* droit d'enquête du pavillion *and the right of visitation and search. Pursuant to her* droit d'enquête du pavillion, *a public ship may board a private vessel to ascertain the private vessel's right to her flag. If warranted, the boarding party may proceed to search the vessel to determine whether she is engaged in some proscribed activity.*

The author finds that in time of peace a state may not interfere with the ships of another state unless there exists an exception to the exclusiv-

ity rule of flag-state jurisdiction. Exceptions to the exclusivity rule permit a state to proceed against a vessel suspected of being (1) a pirate; (2) a trader in slaves; (3) a stateless ship; (4) a threat to the security or integrity of the state; or (5) in actuality a ship belonging to the interfering state, although flying the flag of another state. These exceptions exist as a matter of customary international law and are therefore available to all states. States may also enter into treaty regimes that permit a mutual right of interference, but such an exceptional right is enforceable against treaty parties only. Such a right may exist in the case of suspected pirate radio broadcasters. The author addresses each customary exception to the exclusivity rule as well as the pirate radio broadcaster exception, all of which are codified in the 1982 United Nations Convention on the Law of the Sea.

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